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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. JUSTICE LAMAR ALLEYNE, Defendant and Appellant.	C044440 (Super. Ct. Nos. CM017380, CM017382)

In case No. CM017382, a jury convicted the defendant of burglary and making a criminal threat. (Pen. Code, §§ 459, 422, respectively.) The trial court sentenced him to state prison for the midterm on the burglary conviction, with a concurrent term for the criminal threat.

On appeal, the defendant contends there is insufficient evidence of his identity as the burglar, of his intent to commit a battery inside the dwelling, or of the victim's perception of the criminal threat. He also contends his trial attorney did not provide effective representation because he failed to object to the admission of a call from one of the victims to 911.

Finally, he contends the trial court abused its discretion in denying his motion for a new trial.[1] We shall affirm.

FACTS

The defendant's wife and her young daughter accompanied a friend and her child to the home of the Ellises, who had never previously met the defendant or his wife. The wife's friend also had never met the defendant previously. The friend's husband dropped them off.

Certain facts are not disputed. While at the Ellis home, the defendant and his wife argued repeatedly over her cell phone. Shortly before 5:00 p.m., someone began to bang on the front door of the dwelling, calling out the name of the defendant's wife. Mrs. Ellis peeked out of the crack of the window. She told the defendant's wife, "it's a black male." The defendant's wife ran to the bedroom. Mrs. Ellis retreated to the bedroom and called 911. The other occupants joined her. The intruder kicked in the front door, at which point the defendant's wife jumped out of the second-story apartment's window. The intruder came into the bedroom, picked up the defendant's child, and left with her. The child did not appear to be upset. The defendant's wife eventually found her daughter at the home of her in-laws, where she lived with the defendant.

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[1] In case No. CM017380, the defendant pleaded no contest to evading a police officer. (Veh. Code, § 2800.2.) The court imposed a consecutive sentence. Although he also filed an appeal from that conviction, he does not raise any arguments with respect to it.

In her call to 911, Mrs. Ellis stated that the intruder was "threatening to come in and beat the hell out of his wife." She told the dispatcher that the intruder was Justice Alleyne. She called 911 back to report that the intruder had a gun. Before ending the call, she noted that the defendant's wife had jumped out the window. In her third call, she told the dispatcher that the defendant had taken his daughter. She tried to get his car's description from the others. She described him as a young "tall black male," and that she had seen a gun when she had looked out her window.[2] At this point the deputies arrived. Mrs. Ellis was hysterical; her husband and the defendant's wife were also upset. The defendant's wife's friend did not appear at all distraught; her husband was now also present. The friend told the deputy that the defendant had threatened to beat up or kill his wife as he entered the apartment. Neither the defendant's wife nor her friend would make written statements, although they were willing to talk to the deputy.

Mrs. Ellis provided a written statement to the deputies that night. In pertinent part, it provides, "I am 19 years of age. I live at . . . apartment 21 . . . . [¶] Justice Alleyne came over and broke my door in to get to his wife to kill her, and as he said. [*Sic*.] And then he took his daughter, and his wife jumped out the window right before Justice took his baby. [¶] On his way out of the house, he said he would kill us all."

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[2] At trial, she explained that when she looked out the window, she had thought a board by her front door was the gun.

(Explaining why she had named the defendant as the intruder, she testified that the defendant's wife "was the only person I know that has a black husband, so I figured, put two and two together, it must be her husband.") The 20-year-old Mr. Ellis provided an essentially identical written statement.

The deputy testified that none of the witnesses seemed particularly eager to cooperate in the investigation of the case. The Ellises had ignored his repeated efforts to contact them. He also testified that they told him on the morning of trial that they were afraid of the defendant and did not want to testify.[3]

At trial, the witnesses had little recollection of anything the intruder may have said, denied discussing the incident among themselves, and claimed the intruder had been short and stocky. The defendant's wife, the only witness who was familiar with the defendant, was unemployed and living with his relatives at the time of trial. She testified that she could not recall what was being shouted while the intruder banged on the door before she retreated to the bedroom. She denied being concerned that it was the defendant, claiming that it had not sounded like his voice. She denied ever seeing the intruder who took her child. She also testified that she and the defendant were happy as a family. Her friend testified that when she met the defendant for the first time a month after the incident, she did not think he looked anything like the intruder.

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[3] Mr. Ellis denied this in his testimony.

DISCUSSION

I

A

The defendant contends the evidence of his identity as the intruder is insufficient because nothing in the record indicates that his wife--the only person familiar with him--had any basis to recognize him as the actual intruder before communicating that belief to the others on her way out the window. In his view, the People cannot otherwise connect him with the crime without resort to speculation.

The jury could rationally infer from the coincidental timing of the extended phone argument between the defendant and his wife and the arrival of a black male angrily pounding on the door of people who did not know him, while shouting out the name of the defendant's wife and threatening to beat her, that he was the defendant. The logic of this inference is strengthened when one considers the testimony that the defendant's child did not apparently resist leaving with the intruder, and wound up at the defendant's home. If there is any speculation, it is in the defendant's suggestion that some other person could have been acting at the defendant's behest. There is no basis in evidence for this supposition (such as anyone who witnessed the return of the defendant's child to his home). It is therefore immaterial that the contemporaneous witness reports that the intruder was

threatening to beat up "his wife" may have been based on a faulty assumption on their part.[4]

B

The defendant contends the evidence is insufficient to prove he intended to gain entry in order to batter his wife, because no one testified that he searched the entire apartment for her before he left. This contention is not persuasive.

The extrajudicial statements of the witnesses indicated that the intruder announced his intention to beat the defendant's wife while bursting through the door. This is adequate to sustain the burglary conviction.

C

This leaves the defendant's claim that the evidence is insufficient to prove that the defendant's wife ever perceived his criminal threat because the deputy did not specify that she had complained of his threat. (*In re George T.* (2004) 33 Cal.4th 620, 630 [threat must actually cause fear in victim].)

Cliché though it may be, actions speak louder than words. The witnesses attested to the deputy about the threats against the defendant's wife, which occurred before she jumped out of a second-floor window (conduct which bespeaks considerable fear). This is sufficient evidence whether or not she chose to make a

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[4] It is also immaterial that the witnesses would not confirm these extrajudicial identifications in court. (*People v. Cuevas* (1995) 12 Cal.4th 252, 257, 276-277 (*Cuevas*).)

report personally to the deputy about it; again, her failure to confirm the threats at trial does not render the extrajudicial evidence of the threats and her conduct insubstantial (*Cuevas*, *supra*, 12 Cal.4th at pp. 276-277).

II

The defendant argues that trial counsel was ineffective for failing to seek the exclusion of the 911 transcript. Such a claim would have been futile, and trial counsel was therefore not obliged to advance it. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1173.)

To the extent the 911 call was material, it served as a prior inconsistent statement of Mrs. Ellis, particularly as to her description of the intruder as tall; as to his making threats against the defendant's wife; and as to the threats preceding the defenestration. Moreover, on these points it was a spontaneous utterance (as even the defendant concedes, challenging it only to the extent that it did not reflect her own perception of events, and his argument as to these salient points is nothing more than his own speculations). It was clearly admissible. (Evid. Code, §§ 770, 1235, 1240.)

III

Proceedings on the defendant's motion for a new trial (based on newly discovered evidence of third-party culpability) took place several months after the November 2002 verdicts. The trial court eventually denied the motion in May 2003 and set the matter for sentencing. At the sentencing hearing, the defendant moved to discharge the public defender and substitute retained

counsel in order to move for a new trial on the ground of ineffective trial assistance. The court granted the motion.

In her motion, retained counsel included a list on which the defendant identified the perceived shortcomings of trial counsel. Among these were the failure to call the husband of his wife's friend to testify that the defendant was not the person who invaded the dwelling,[5] and the failure to introduce a description of the invader contained in a crime alert.[6] The court denied the motion without elaboration and imposed sentence

A

The prosecutor had listed the friend's husband among his witnesses, but did not call him. As the prosecutor did not file opposition to retained counsel's motion, and retained counsel did not include any statement from trial counsel, we do not have any explanation for the failure of either party to call the witness. On this record, the defendant cannot show ineffective assistance of trial counsel. The report indicated only a negative pregnant that the friend's husband said that he did not see the defendant kick the door. This is ambiguous; it could mean either that he saw someone else kick the door, or that he had not been present at the time of the door kick.[7]

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[5] He based this on the remark in the deputy's report that the husband "was standing outside apartment 21 but said he did not see Justice kick the door."

[6] The alert described him as five feet 10 inches tall, weighing 135 pounds, and being armed and dangerous.

[7] Considering that he had given his wife and the defendant's

Absent contrary evidence on the record, we may thus presume trial counsel investigated this ambiguity and found that the witness did not have first-hand knowledge of the incident. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

B

The deputy testified that he did not include the physical description he obtained from the witnesses in his report, but he believed the crime alert that authorities broadcast incorporated the information. He was not that concerned about this detail, because there were witnesses who had identified the suspect by name, including the defendant's wife, and he was familiar with the defendant (as was the 911 dispatcher). However, in his motion for a new trial, trial counsel noted that the crime alert's description was "based on a prior juvenile file that listed him as 5'10" tall"[8] rather than the physical description from the witnesses, who claimed they had indicated a shorter and stockier person such as the five-foot four-inch third party proffered in the motion.[9]

It is thus apparent that trial counsel did not believe the crime alert (which was broadcast by dispatchers based on the deputy's radioed report) had any value as independent proof of

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wife a ride and did not join them inside the Ellis residence, it does not seem likely that he had lingered outside the dwelling until they were ready to leave.

[8] The defendant at the time of trial was six feet three inches tall and weighed 170 pounds.

[9] Neither party has remarked on this representation in trial counsel's motion.

the actual physical description that the witnesses provided, because he believed its description came from the authorities' past dealing with the defendant and not the witnesses. (Indeed, in the 911 call, Mrs. Ellis described him as tall.) Thus, absent evidence on the record that would establish the unreasonable nature of trial counsel's belief, the defendant failed to show ineffective assistance of trial counsel (particularly where the height in the crime alert (five feet 10 inches) would not corroborate the trial testimony of the witnesses describing an even shorter man).

DISPOSITION

The judgment is affirmed.

DAVIS, Acting P.J.

We concur:

ROBIE, J.

BUTZ, J.